Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

No. 91-1209

In the Supreme Court of the United States

OCTOBER TERM, 1991

NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION, PETITIONERS

v.

OLIVER J. FOUST AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

ANNE S. ALMY
ANDREW C. MERGEN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, under 43 U.S.C. 1746, the Secretary of the Interior may correct a patent disposing of public land so as to grant title to land that had been withdrawn from entry (as a powersite reserve) at the time the land was settled.

2. Whether the land at issue—which was conveyed to the United States pursuant to an agreement calling for the government to pay any proceeds derived from sales of the land to Indian Tribes and then was purportedly patented to non-Indians—is properly characterized as "public land" or "Indian land" for purposes of 43 U.S.C. 1746.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Ash Sheep Co. v. *United States*, 252 U.S. 159 (1920)	9
Ben R. Williams, 57 I.B.L.A. 8 (1981)	2
George Val Snow, 79 I.B.L.A. 261 (1984)	2

Statutes and regulation:

Act of Mar. 3, 1905, ch. 1452, 33 Stat. 1016	2, 3
Federal Land Policy and Management Act, 43 U.S.C. 1701 *et seq.*:	
43 U.S.C. 1702(e)	2
43 U.S.C. 1702(e)(2)	8
43 U.S.C. 1746	2, 3, 4, 7, 8, 11
43 U.S.C. 697 (1964)	7
43 C.F.R. 1865.0-5(b) (1990)	2

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1209

NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION, PETITIONERS

v.

OLIVER J. FOUST AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 942 F.2d 712. The opinion of the district court (Pet. App. 15a-31a) is unreported. The opinion of the Interior Board of Land Appeals (Pet. App. 33a-52a) is reported at 102 I.B.L.A. 256.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1991. A petition for rehearing was denied on October 24, 1991. Pet. App. 58a-59a. The petition for a writ of certiorari was filed on January

22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Land Policy and Management Act (FLPMA) authorizes the Secretary of the Interior to "correct patents or documents of conveyance * * * relating to the disposal of public lands where necessary in order to eliminate errors." 43 U.S.C. 1746. Under the statute, "public lands" is defined so as not to include "lands held for the benefit of Indians." 43 U.S.C. 1702(e). The regulations implementing the statute further provide that "error" is "limited to mistakes of fact and not of law." 43 C.F.R. 1865.0-5(b) (1990). In addition, the Board of Land Appeals of the Department of the Interior (IBLA) has made clear that the "[a]mendment of a patent is an extraordinary action, and one who seeks to do so must establish that error did occur." *Ben R. Williams*, 57 I.B.L.A. 8, 14 (1981). And a patent correction is a discretionary matter, so an applicant who successfully establishes that a factual error occurred must also demonstrate that considerations of equity and justice warrant the issuance of a patent correction. *George Val Snow*, 79 I.B.L.A. 261, 262 (1984).

2. In 1982, respondent Oliver Foust applied, pursuant to Section 1746, for a correction to a land patent issued by the United States in 1936 to Byron Smith, Foust's predecessor in title. Pet. App. 2a, 35a. The land at issue is located on a portion of the Wind River Indian Reservation that was opened to entry by non-Indians in 1905. Act of Mar. 3, 1905, ch. 1452, 33 Stat. 1016. Under the 1905 Act, "the United States agree[d] to pay the said Indians the proceeds

derived from the sale of said lands." Pet. App. 63a. In 1910, a portion of the land was withdrawn from entry as a federal powersite reserve. *Id.* at 65a-69a. Smith subsequently built two houses and garages on land that had been opened to entry by the 1905 Act. The patent that he requested and received in 1936 was for the "NE1/4 SE1/4 and lots 4 and 5" of Section 28 of the land. *Id.* at 2a.

In 1942, the United States restored all undisposed land within Section 28 to the ownership of petitioners, the Northern Arapaho and Shoshone Indian Tribes of the Wind River Reservation. Pet. App. 75a-79a. The undisposed land included the land that had been set aside as a powersite reserve. In 1963, Smith's widow conveyed the NE1/4 SE1/4 and lots 4 and 5 to Foust by warranty deed. In 1979, a resurvey of the area showed that the buildings that Smith had built and indicated as being on the NE1/4 SE1/4 were, in actuality, located on the SW1/4 NE1/4—that is, on the land that had been set aside as a powersite reserve. *Id.* at 2a-3a.

In his request for a patent correction, Foust contended that Smith had mistakenly built on the powersite reserve because of the difficulty in surveying mountainous terrain and ascertaining lot boundaries. Pet. App. 35a. Foust asserted that this mistake of fact could be corrected under Section 1746, and he proposed deeding back to the United States (and hence to the Tribes) the NE1/4 SE1/4 and lot 5 in exchange for roughly equal acreage on which the buildings are located. *Id.* at 35a-36a. The Bureau of Land Management (BLM) approved Foust's application for a correction and his proposed remedy. *Id.* at 53a-57a.

3. The IBLA reversed BLM's decision. Pet. App. 33a-52a. The IBLA first concluded that it was not

clear that Smith had made a mistake of fact. In reaching that conclusion, the IBLA was impressed by the fact that the land for which Smith obtained a patent and the powersite reserve "touch only at a corner and do not share a single boundary." *Id.* at 44a. The IBLA thought it "extremely unlikely that Smith mistakenly confused the location." *Ibid.* The IBLA suggested that Smith had intentionally misdescribed the land because "had Smith applied for the lands which he actually improved, his application would have been rejected because the lands were included in a powersite withdrawal." *Ibid.*

The IBLA further found that the equities did not favor Foust. In that regard, it stressed that the same survey techniques used in 1979 to determine that the land Smith had improved was on the powersite reserve were available in 1963 when Foust purchased the property from Smith's widow. Pet. App. 48a. The IBLA would not forgive "the apparent neglect of a purchaser who failed to obtain a survey of lands prior to sale." *Ibid.*

4. The United States District Court for the District of Wyoming affirmed the IBLA's decision. Pet. App. 15a-31a. The court concluded that "an extensive review of the administrative record compiled in this matter convinces the Court that the IBLA decision is not arbitrary and capricious but, rather, is supported by substantial evidence and is in conformity with the law." *Id.* at 30a.

In addition to finding a reasonable basis for the IBLA's conclusions that Smith did not make a mistake of fact and the equities do not favor Foust, the district court questioned whether relief was available under Section 1746 in any event because the land in question was not open to entry, but had been reserved as a potential powersite. The court acknowledged

that Congress amended FLPMA in 1976 to delete language requiring that patent corrections be limited to cases where the land at issue was available for entry. However, after noting that "the legislative history is silent as to why the prior language was deleted," the court "view[ed] the deletion of the entry language from § 1746 as part of a concerted effort to simplify public land administration while retaining the basic precepts of public land law." Pet. App. 27a-28a.

5. The court of appeals reversed the district court's judgment and held that the IBLA decision was not supported by substantial evidence and was arbitrary and capricious. Pet. App. 1a-14a. As an initial matter, the court concluded that "[t]he meaning of the congressional amendment deleting the entry language is clear: the statute no longer requires the land's availability for entry to correct a patent." *Id.* at 5a. Accordingly, the court held that the fact that the land on which Smith built was a powersite reserve in 1936 did not preclude the Secretary of the Interior from correcting the patent. The court also rejected the Tribes' argument that the Secretary cannot correct the patent because the land was restored to the Tribes in 1942. The court said that what mattered was that "the lands in question were public lands at the time the patent was issued," because the lot "was owned by the United States, administered by the Secretary, and not held in trust for the Indians in 1936." *Id.* at 5a-6a.

The court of appeals next found "overwhelming evidence of mutual mistake of fact." Pet. App. 7a. In that regard, the court found most significant the fact that in 1935, before the patent was issued, "a special agent for the Department of Interior con-

ducted a field investigation and determined that Smith had resided on the land he claimed he had entered." *Id.* at 9a. The court also stressed that Smith had described the lot as having a spring, and the only spring in the area was on the powersite reserve. *Id.* at 8a. The court of appeals acknowledged that "[t]he lack of a common boundary * * * does raise a question about how the mistake could have been made," but concluded that "[t]he difficulty of surveying the area at the time because of the rough and steep topography could account for everyone's mistaken belief." *Id.* at 10a.

The court of appeals went on to hold that the equities favored Foust. The court stressed that Foust "is elderly, widowed, and living on the land in question." Pet. App. 11a. It added that "[h]e has lived there for twenty-eight years, paid the taxes, maintained the property, and made further improvements. He would suffer severe economic hardship if he were to lose his home." *Id.* at 11a-12a. The court added that a "win for the Indians would appear to be a windfall to the extent of the excess value of the improvements." *Id.* at 13a.

Judge McKay dissented. Pet. App. 14a. He "agree[d] with the majority that 43 U.S.C. § 1746 provides statutory authority to reform the deed at issue." *Ibid.* And he added that "[h]ad I been the Interior Board of Land Appeals (IBLA), I would have weighed the facts largely as the majority has done." *Ibid.* But he could not say that the IBLA's decision was arbitrary and capricious or was not supported by substantial evidence. *Ibid.*

ARGUMENT

In the lower courts, the Secretary of the Interior defended the decision of the Interior Board of Land Appeals by arguing, first, that the evidence did not clearly show that Smith had made a mistake of fact and second, that the equities do not favor Foust. We continue to believe that the IBLA's decision was not arbitrary and capricious or unsupported by substantial evidence. However, neither of those factbound issues warrants review by this Court. Nor do the legal issues raised by the Tribes in their petition. Whatever the merits of the Tribes' positions on those novel questions, the practical consequences of the court of appeals' decision appear to be quite limited, since the court recognized that the Secretary has authority to correct a patent only where a strong showing can be made that a mistake of fact occurred and the equities favor correction.

1. Petitioners first argue that the court of appeals erred by concluding that the Secretary of the Interior had authority under Section 1746 to correct the patent since the land on which Smith built had been set aside as a powersite reserve. Pet. 11-19. In petitioners' view, the fact that the land was withdrawn from entry at the time Smith made his improvements precludes the Secretary from correcting the patent. Pet. 18-19. There is no merit to this argument.

Before 1976, the Secretary was expressly prohibited from amending a patent when the result would be to convey land that was not subject to entry. 43 U.S.C. 697 (1964). This prohibition does not appear in 43 U.S.C. 1746. The court of appeals held that "[t]he meaning of the congressional amendment is clear: the statute no longer requires the land's availability for entry to correct a patent." Pet. App. 5a. On this point, the court of appeals' decision is sound. And

contrary to petitioners' contentions, Congress's action may not be ignored because "the legislative history is silent as to why the language of 43 U.S.C. § 697, requiring the consideration of the availability of the land sought, was deleted." Pet. 18. Congress's action speaks for itself.

Nor is there any conflict on this point between the decision of the court of appeals and any decision of this Court or another court of appeals. Petitioners note that a number of courts have held that a homesteader who occupies public land that has been withdrawn from entry acquires no legal or equitable rights. Pet. 11-15. That proposition is not contrary to the further conclusion that the Secretary may correct a patent if it appears that a mistake of fact has been made and that the equities favor correction of the patent. None of the cases cited by the petitioners involved the question presented here: whether Section 1746 authorizes the correction of a patent to convey land that was actually withdrawn from entry at the time it was settled.

2. Petitioners also contend that the patent in question is not subject to correction because the land at issue is Indian land, not public land. Pet. 19-29. In this connection, they correctly note that Section 1746 authorizes the correction of patents relating to the disposal of "public lands," Pet. 21, and that Section 1702(e)(2) excludes from the definition of "public lands" lands that are "held for the benefit of Indians." Pet. 24.

Petitioners present two different arguments in support of their claim that the patent in question is not subject to correction because the land at issue is Indian land. The first is the argument considered and rejected by the court of appeals, which is based on the fact that the powersite reserve was returned

to the Tribes in 1942. Pet. 11-19. The court said that what mattered "is whether the lands in question were public lands at the time the patent was issued." Pet. App. 6a. That conclusion is not plainly contrary to the statutory language. Nor is there any conflict between the decision below and any decision of this Court or another court of appeals on that question.

The second argument, which was not considered by the court of appeals, is that the land at issue was not public land in 1936, but rather was Indian land, because it was held in trust for the benefit of the Tribes. Pet. 19-24. The basis for this argument is that the land had been opened to entry by non-Indians in 1905 pursuant to an Act of Congress requiring the government to "pay the said Indians the proceeds derived from sales of said lands," Pet. App. 63a, and this Court held in *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 166 (1920), that land that had been ceded by Indians to the government pursuant to a similar agreement remained "Indian land" until it was sold. More specifically, *Ash Sheep* involved a statute providing that any person who allowed livestock to graze on "land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock." See *id.* at 163. The agreement at issue in *Ash Sheep* provided that the government "would pay the proceeds [of land sales] to the Indians," and the Court held on account of that agreement that "the lands described in the bill were 'Indian lands' when the company pastured its sheep upon them." *Id.* at 165, 166.

Whether the holding of *Ash Sheep* should be extended from the context of an action to recover a penalty for grazing to the context of this case is a nice question. On the one hand, there is no apparent reason why land should be Indian land for purposes

of the grazing statute but not for purposes of the patent correction statute. On the other land, petitioners' interpretation of the statute may lead to harsh results—for example, under their construction of the statute Foust would lose his property even if it were absolutely clear that Smith had made a mistake of fact and Foust had done everything possible to ensure that the property he purchased had been surveyed accurately.

But whether the rule of *Ash Sheep* should be applied here does not warrant review by this Court at this time. As an initial matter, no court—including the court below—has addressed the issue. And petitioners cannot complain about the failure of the court of appeals to address the issue: although they cited *Ash Sheep* in the statement of the case in their brief in the court of appeals (Petrs.' C.A. Br. 8), they did not argue on the merits that correction of the patent was barred because the land was "Indian land" at the time it was settled by Smith. Rather, in addition to arguing that the IBLA correctly determined that it was not clear that Smith had made a mistake of fact and that the equities did not favor Foust, petitioners argued to the court of appeals that a patent correction could not issue because the lands "were not available for entry when they were initially settled" because they "had been set aside as a powersite reserve" in 1910. Petrs.' C.A. Br. 14-24. The court of appeals addressed that argument and rejected it.

In addition, review is not warranted as to whether the land in question is properly characterized as public land or as Indian land because the practical effect of the court of appeals' decision appears to be quite limited. The court recognized that decisions of the IBLA are subject to review under a deferential standard, Pet. App. 3a-4a, and further recognized that

Foust had to show both that Smith had made a mistake of fact and that the equities favored correction of the patent. *Id.* at 5a, 11a. In the court of appeals' view, there was "overwhelming evidence" that Smith had made a mistake of fact. *Id.* at 7a. While we disagree with that conclusion, litigants challenging a decision of the IBLA will not often be able to make a showing as strong as the one Foust was able to present. In particular, we think it will be an unusual case where an applicant for a patent correction will be able to show that a government agent inspected the land and agreed with an erroneous description of the property, the evidence that the court of appeals found "most significant[]" in this case. *Id.* at 9a. And especially as summarized by the court of appeals, Foust was able to present a strong case on the equities, since he is an elderly widower who has lived on the land for many years and "would suffer severe economic hardship if he were to lose his home." *Id.* at 12a.

In short, petitioners exaggerate the importance of the decision below by claiming that "the decision threatens tribal land throughout the nation." Pet. 19. To the contrary, insofar as petitioners' *Ash Sheep* argument is concerned, the decision below has no precedential effect, because the court of appeals did not consider that argument. Moreover, we think it unlikely that more than a few applicants for patent correction will be able to mount as strong a case as Foust. If we are wrong, review may be warranted at some point. But review is not warranted now, when no court has decided whether land that has been conveyed to the United States pursuant to an agreement requiring the government to pay the proceeds of land sales to Indian Tribes is properly characterized as "public land" or "Indian land" for purposes of 43 U.S.C. 1746.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

ANNE S. ALMY
ANDREW C. MERGEN
Attorneys

MARCH 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45375